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CASE CLIPS

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CRIMINAL LAW ISSUES

INGLE v. STATE, No. 22S00-9611-DP-724, ___ N.E.2d ___ (Ind. May 3, 2001).
SULLIVAN, J.

The State's theory was that Defendant was attempting to remove Debbie by force from the bar to convince her to reconcile with him and that this constituted his attempting to make her his "hostage." Defendant contends that a person is only a "hostage" if the person has been confined or removed by the abductor to secure an act or forbearance from a third party. The evidence is undisputed that Defendant was trying to secure something from Debbie only – her promise to return to him – and not from a third party. . . .

. . . The success of Defendant's claim depends, therefore, on whether the Legislature meant the kidnapping statute [IC 35-42-3-2] to apply when the abductor's only goal is to get a third party to do or not do something or also to apply when the abductor's goal is to get the victim to do something or not do something.

[T]he Legislature has not defined the term "hostage." [Citation omitted.] . . . Two aspects of the way in which the Legislature has written our criminal code indicate to us that Defendant's reading of the statute is correct.

First, the Legislature has created another, different, crime – criminal confinement [IC 35-42-3-3] – that covers the situation where a perpetrator abducts a victim in order to induce some act or forbearance on the victim's part. . . . The crime of criminal confinement is clearly a lesser included offense of kidnapping. But if the term "hostage" encompasses a victim confined or removed by a perpetrator for no purpose beyond inducing some act or forbearance on the part of the victim alone, every act of criminal confinement would constitute a hostage-taking. This is because the force or coercion exercised in a criminal confinement always induces an act or forbearance on the part of the

victim; at the very least, the victim is induced to submit and cooperate in the confinement.

While it is conceivable that the Legislature intended to have both the crimes of criminal confinement and kidnapping cover the same situation, we believe it is more likely that the Legislature did not intend for kidnapping to apply to the situation where the abductor's only goal is to get the victim to do or not do something. Rather, we believe the Legislature intended for kidnapping to apply to those more aggravated situations where the abductor intends for third persons to become involved.

A second aspect of the way in which the Legislature has written our criminal code supports this conclusion.

The four subsections of the kidnapping statute each refer to scenarios where a victim becomes a tool in the abductor's plan. First, in subsections (1) and (3) of § 35-42-3-2, the

ransom or the release of a person lawfully confined are ultimate goals, and the victim confined is merely a pawn in the larger scheme; in a hijacking under subsection (2), transportation is usually the ultimate objective; and it is clear that a shield under subsection (4) is used to ward off some independent force. These subsections all suggest situations in which a neutral captive is taken as the means to obtain a separate primary end. Given the meaning of the other subsections of § 35-42-3-2, a consistent definition of hostage would refer to one who is taken to secure some separate demand from another party.

. . . .

We hold that the term "hostage" in the Indiana kidnapping statute, Indiana Code § 35-42-3-2 (1993), refers to a person who is held as security for the performance or forbearance of some act by a third party. To the extent such a person is held solely to secure demands upon that person alone, the perpetrator may be guilty of criminal confinement, Indiana Code § 35-42-3-3 (1993), but not kidnapping.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, And RUCKER, JJ., concurred.

KRISE v. STATE, No. 16S05-0002-CR-118, ___ N.E.2d ___ (Ind. May 9, 2001).

SULLIVAN, J.

The Court of Appeals affirmed the trial court's judgment, finding that a third-party's consent to a warrantless search of a home includes permission to search all containers, and in particular, a purse located inside the home. See Krise v. State, 718 N.E.2d 1136, 1142 (Ind. Ct. App. 1999). . . .

. . . .

The twists and turns of Fourth Amendment law are often difficult to negotiate, with variations in fact patterns often determinative of the outcome of cases involving warrantless searches. Here we perceive four variables in the facts that require particular attention. First, as already noted, the warrantless search was made pursuant to consent (rather than probable cause as in many reported cases). Second, the search was of a home (rather than a vehicle). Third, the search was of a purse. And fourth, the person consenting to the search was not the owner of the purse.

. . . .

Taken together, [Wyoming v.] Houghton[[526 U.S. 295 (1999)], [United States v.] Ross [456 U.S. 798 (1982)], and [Florida v.] Jimeno [500 U.S. 248 (1991)] appear to indicate that the scope of a probable cause search of a vehicle, the scope of a warrant search of a home, and the scope of a consent search are all generally defined by the object of the search.

However, unlike a probable cause (or warrant) search, the scope of a consent search is measured by objective reasonableness. [Citation omitted.] . . . [U]nlike a probable cause (or warrant) search, a consent search allows for a suspect to limit or restrict the

search as he or she chooses. [Citations omitted.]

These principles indicate that the scope of consent is factually sensitive and does not solely depend on the express object to be searched. In contrast, probable cause to search a vehicle and a warrant to search a home authorizes the search of every part of the vehicle or home and closed containers therein that may conceal the object of the search despite the suspect's wishes to place limitations and regardless of the officer's belief as to the type of the container to be searched. [Citations omitted.]

In addition, we note two more distinctions between the probable cause exception and the consent exception to the warrant requirement. First, a search validated by consent carries with it additional legal requirements that are not imposed for a search justified by probable cause. For instance, a permissible consensual search requires a voluntary

consent, [citation omitted], and in third-party consent cases, the individual's authority (actual or apparent) to consent to the search of a non-consenting party's property must be established, [citations omitted] A search justified by probable cause, with or without a warrant, does not implicate any of these factors and therefore is less restricted.

Second, the policies that justify probable cause searches (and warrant searches) differ from those supporting consent searches. Searches validated by probable cause require a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. [Citation omitted.] . . .

. . . .

As briefly noted, the present case conflicts with another recent Indiana opinion, State v. Friedel, 714 N.E.2d 1231 (Ind. Ct. App. 1999), transfer not sought. Both cases involve a warrantless search of a purse justified by a third-party's consent to a general search. . . . The court rejected the State's argument, which relied on Jimeno, that the third-party's scope of consent to search the car included the search of the purse. [Citation omitted.] . . .

The Court of Appeals panel in this case came to an opposite conclusion from the Friedel panel. In upholding the search of Krise's purse, the court determined the following:

> [A]lthough the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, [citation omitted], the determination of reasonableness [for scope of consent] pertains to the third person's authority over the premises in question and not any particular container within a common area of such premises. [Citation omitted.]

[Citation omitted.] The court went on to hold that "it was reasonable for the officers to conclude that Tungate and Krise had mutual use of and joint access to the bathroom, and thus the purse and items therein were under Tungate's and Krise's common authority." [Citation omitted.] The court also found that because Tungate did not place any explicit limitations on the scope of the officer's search and did not restrict the search by excluding personal items belonging to Krise, it was reasonable for the officers to believe that Tungate's consent to the home included the search of Krise's purse. [Citation omitted.]

. . . [T]he scope of a consent search is measured by objective reasonableness, the express object to be searched, and the suspect's imposed limitations. Thus, the scope of a consent search is factually sensitive and does not solely depend on the express object to be searched. If we were to apply the scope of consent rules . . . to the facts in this case, arguably one could conclude, as the Court of Appeals did here, that Tungate's consent to search the jointly-occupied home included the search of Krise's purse simply because Tungate did not limit or restrict the search in any way. [Citation omitted.] In addition, Tungate gave the officer permission to search the house for drugs. Since Krise's purse is a container where contraband could be found, then the scope of the search would have been proper.

On the other hand, the objective reasonableness standard allows for the extent of the suspect's consent to vary depending on the circumstances. Indeed, the Supreme Court . . . found it unreasonable for an officer to believe the consent to search a trunk would authorize a search of a locked briefcase inside the trunk. [Citation omitted.] A locked briefcase is comparable to a purse in that both are closed containers that often hold personal items. Arguably then, it would have been unreasonable for the officer to believe that Tungate's consent to the general search of the home included the search of a purse that clearly did not belong to him. Under this approach, application of the scope of consent rules could have resulted in an unlawful search of Krise's purse.

. . . .

We conclude that the issue is not only whether the purse was within the scope of the consent search, but also whether the third party had actual or apparent authority to consent to the search of the purse. [Citation omitted.] Thus, the essential factors in this case are whether Tungate had the authority to consent to the search of the home, whether he had authority to permit the search of personal items belonging to Krise, and whether he consented to the search of Krise's purse. . . .

. . . .

In considering Tungate's actual authority to consent to the search of the home, it is an undisputed fact that Tungate owned and shared the home with Krise, thus the two had joint access to and mutual use of the home. . . .

. . . The central question becomes whether the sharing of a home (in particular, the bathroom) means that common authority exists to consent to search containers belonging to only one occupant. Put another way, did Krise assume the risk that by living in the same house as Tungate, he would permit outsiders to inspect not only the common areas of the home but also her personal effects? . . .

. . . .

Rather than considering a third-party's authority to consent to the general search of the home as "all encompassing" to the search of every container found inside the home, we hold that the inspection of closed containers that normally hold highly personal items requires the consent of the owner or a third party who has authority — actual or apparent — to give consent to the search of the container itself.

In reaching this conclusion, we find that the type of container is of great importance in reviewing third-party consent search cases. . . .

The first part of the analysis requires a determination that Krise held an actual, subjective expectation of privacy in the area and personal item searched. In making this determination, we look at the steps that Krise took to preserve her privacy. [Citations omitted.] Here, the purse was located in the bathroom, a common area of the home where Tungate could gain access to it. It was not located in a closet or inside a dresser drawer where Krise could have expected more privacy. But the bathroom is one of the more private areas of a home. Beyond that, the purse was located inside her home and thus was not accessible to the general public. We do not believe that Krise's expectation of privacy in her home and bathroom in general, and her purse in particular, was diminished simply because it was readily accessible to one joint occupant, Tungate. [Citation omitted.]

For the second part of the analysis, we must determine whether Krise's expectation of privacy under these circumstances is one which society is prepared to accept as objectively reasonable. [Citations omitted.] . . .

. . . [W]e believe that society accepts as objectively reasonable that persons have a legitimate expectation of privacy their purses and other closed containers that normally hold highly personal items.

We do acknowledge that in cases involving the scope of automobile searches justified by probable cause, the United States Supreme Court has warned against constitutionally distinguishing between "worthy" and "unworthy" containers. [Citations omitted.] . . . The Supreme Court has suggested that individuals have a higher expectation of privacy in containers and their contents which are located inside the sanctity of their own home — where privacy interests are paramount — than in their vehicles where privacy interests are diminished. . . .

. . . In applying these principles to this case, a valid warrantless search of Krise's purse required a showing of Tungate's mutual use of and joint access to the premises as well as the purse. Tungate gave a voluntary consent to the general search of the home which he shared with Krise and had authority to do so. However, the State has not proven that

Tungate had mutual use of or joint access to Krise's purse, and in fact, Tungate testified that he did not have access to her purse. Nor has the State shown that Krise gave Tungate permission to have access to her purse in any way. Krise had a legitimate expectation of privacy in her home and her purse and its contents. Because Tungate clearly lacked any privacy interests in Krise's purse, [citation omitted], we conclude that Tungate had no actual authority to consent to the search of Krise's purse. We also find that the State failed to justify the search on the basis of apparent authority. At the time Officer Underhill decided to search Krise's purse, he knew that the handbag was a woman's purse and that Krise was the only woman living in the house. Another officer testified that there was no doubt in his mind that the handbag seized was a woman's purse. There is no evidence showing that Tungate told police that he shared the purse, or had joint access to the purse in any way. The mere fact that the purse was located in the common area of the house did not render reasonable a belief that Tungate had the requisite authority to consent to the search of Krise's purse. [Footnote omitted.]

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

TURNER v. STATE, No. 34A05-0009-CR-380, ___ N.E.2d ___ (Ind. Ct. App. May 3, 2001).
SULLIVAN, J.

[T]urner was charged with knowingly consuming an alcoholic beverage as a minor, [IC 7.1-5-7-7(a)] a Class C misdemeanor. . . . [D]efense counsel argued that "[t]here has been no testimony presented to what type of beer [Turner] consumed and that it contained point five percent or more of alcohol." [Citation to Record omitted.] . . .

. . . .

[T]here are recent decisions from our Supreme Court and this court which would seem to support a conclusion that a chemical analysis of an alleged alcoholic beverage is not required. [Citations omitted.] These cases hold that the identity of a drug may be established by circumstantial evidence, thereby rejecting the notion that a chemical analysis, which is direct proof of a drug's identity, must be offered into evidence. [Citations omitted.]

Although none of the cases mentioned above addressed whether an "alcoholic beverage" could be established by circumstantial evidence, we can discern no reason why it should not be. . . .

We now turn to the facts of this case to determine whether there was sufficient circumstantial evidence establishing that the beverage Turner drank was an alcoholic beverage. First, there is overwhelming evidence that Turner was in a state of intoxication. . . . In addition, the portable breath test Turner was given revealed a positive result. [Footnote omitted.] Finally, Turner admitted that he had consumed four beers. While that admission does not necessarily exclude the possibility that the beer was nonalcoholic,

[footnote omitted] because Turner did not attempt to describe the "beer" as nonalcoholic or near beer, the trier of fact was permitted to infer that the defendant was referring to beer as it is commonly known. [Citation omitted.] Finally, the trier of fact was permitted to consider the obvious effects of the four beers Turner admitted he consumed. [Citation omitted.]

While any of these factors alone might not have supported the verdict, when considered together they provide sufficient evidence that the beer Turner consumed contained at least .5% alcohol by volume. However, under a different set of facts where a chemical analysis is not performed when the beverage is available for testing, the State risks forfeiting a prosecution upon appeal. . . .

. . . .

SHARPNACK, C. J., and MATHIAS, JJ., concurred.

EDWARDS v. STATE, No. 09A02-0009-CR-608, ___ N.E.2d ___ (Ind. Ct. App. May 9, 2001).
SHARPNACK, C. J.

The passenger was subsequently arrested. [Footnote omitted.] . . . Police officers found a baggie with seven rocks of crack cocaine weighing 1.12 grams hidden between the passenger's buttocks.

. . . .

Here, Officers Smith and Rogers stopped the vehicle in which Edwards was a passenger because it was being driven 10 to 15 miles per hour over the speed limit on a snow-covered street. When approached by Officers Smith and Rogers, the driver and the passenger both identified themselves as Michael Edwards and gave the same dates of birth. When confronted, the passenger apologized for his dishonesty and identified himself as Michael Smith, Miguel Smith and Nigel Smith. He also gave the officers two different dates of birth. These specific and articulable facts justified both the stop of the vehicle and the detention of its occupants for investigative purposes. [Citation omitted.]

Further, we agree with the State that "the manner in which Edwards acted also gave police probable cause to arrest him." [Citation to Brief omitted.] Probable cause for arrest exists where at the time of arrest the officer has knowledge of facts and circumstances which warrant a man of reasonable caution to believe a suspect has committed the criminal act in question. [Citation omitted.] . . .

Here, during the course of the investigatory stop, Edwards provided the officers with four different names and three different dates of birth. We agree with the trial court that these facts and circumstances would warrant a man of reasonable caution to believe that Edwards was giving false information to a police officer and committing an offense such as false informing, a misdemeanor. [Footnote omitted.]

. . . .

MATHIAS, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he concurred, in part , and in which he dissented, in part, as follows:

I concur in the conclusion of the majority that probable cause existed for the arrest of Edwards for an offense such as false reporting or some other crime involving the use of false names and/or permitting unlawful use of his identification by the driver of the vehicle. I respectfully dissent, however, from the majority's conclusion that the strip search of Edwards was constitutional merely because it was incident to his arrest. . . .

. . . .

I would adopt the reasoning of the Seventh Circuit and hold that, before the police may strip search an individual detained for a minor offense, such as Edwards, they must have a reasonable suspicion that the defendant was in the possession of weapons or contraband. [Footnote omitted.]

. . . .

JONES v. STATE, No. 42A05-0005-CR-181, ___ N.E.2d ___ (Ind. Ct. App. May 9, 2001).
SULLIVAN, J.

At trial, Jones asked Winters if he knew the possible sentence for a Class B felony. The State immediately objected, and the trial court sustained the objection. Thereafter, Jones asked Winters if he remembered being informed of the possible penalty for a Class B felony during plea negotiations. Again, the State objected. . . . The jury was never informed of the penalty Winters could have received.

. . . .

The Indiana Supreme Court has held that any beneficial agreement between an accomplice and the State must be revealed to the jury. [Citations omitted.] . . . It is insufficient that the mere existence of a beneficial plea agreement be revealed to the jury; the *extent* of the benefit offered to a witness is relevant to the jury's determination of the weight and credibility of that witness's testimony. Standifer, 718 N.E.2d at 1110.

. . . [T]he State claims that had the jury been informed of the penalty Winters would have faced had he not pleaded guilty, it would also have been informed about the potential sentence Jones faced—a matter not properly before the jury. [Citation omitted.]

This same argument was presented to our Supreme Court in Jarrett v. State, 498 N.E.2d 967 (Ind. 1986). . . . The Jarrett court further stated, "Against the crucial role of full and proper cross-examination, *the State's desire to censor sentencing information is clearly subordinate.*" [Citation omitted.]

. . . .

Here, the trial court abused its discretion when it sustained the State's objections to Jones questioning Winters regarding his potential sentence. . . .

. . . .

[W]e cannot say that the State has demonstrated beyond a reasonable doubt that the trial court's error did not contribute to the verdict, and Jones's conviction upon the charge of robbing the motel on August 4, 1999, must be reversed. . . .

. . . .

SHARPNACK, C. J., and MATHIAS, J., concurred.

CIVIL LAW ISSUES

DAVIS v. FORD MOTOR CO., No. 20A03-0010-CV-367, ___ N.E.2d ___ (Ind. Ct. App. May 9, 2001).

KIRSCH, J.

Where a defendant's motion for judgment on the pleadings is brought pursuant to Ind. Trial Rule 12(C) on the basis that the complaint fails to state a claim on which relief can be granted, does the trial court abuse its discretion by failing to treat the motion as one brought under Ind. Trial Rule 12(B)(6) and denying the plaintiff the right to amend the complaint?

We reverse.

. . . .

The Davises maintain that Ford's motion should have been treated as a motion to dismiss pursuant to T.R. 12(B)(6) and contend that they should have been afforded the opportunity to amend their complaint. Under T.R. 12(B)(6), if the movant is successful, the non-movant may amend its pleading once as of right within ten days after service of notice of

the court's order. By contrast, T.R. 12(C), contains no provision allowing amendment. Here, the basis of Ford's T.R. 12(C) motion was that the Davises' amended complaint "fails to state a claim upon which relief can be granted against Ford." [Citation to Record omitted.] . . .

Wright and Miller [footnote omitted] explain the distinction between a Rule 12(b) and Rule 12(c) motion as follows:

> "The granting of a Rule 12(b) motion merely means that plaintiff has failed to satisfy one of the procedural prerequisites for asserting his claim for relief. A motion for judgment on the pleadings, however, theoretically is directed towards a determination of the substantive merits of the controversy."

5A, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1369 at 532-33. . . . Wright and Miller also opine:

> "The mere fact that these procedural defects are raised in the guise of a Rule 12(c) motion should not affect the manner by which the court determines what essentially are Rule 12(b) matters. In this context, Rule 12(c) is merely serving as an auxiliary device that enables a party to assert certain procedural defenses after the close of the pleadings." [Citation omitted.] . . .
>
> . . . .
>
> A motion for judgment on the pleadings should be granted only when it is clear from the face of the complaint that under no circumstances could relief be granted. [Citation omitted.] Here, that is not the case. The complaint alleges that the Davises were injured when Exhibiteam's van driven by Fisher collided with the vehicle in which they were riding. The complaint also alleges that Ford may be responsible. . . . Rather, the pleadings do not disclose the set of facts under which the Davises are proceeding against Ford. Accordingly, we agree that the Davises' complaint fails to state a claim. However, the Davises should have been given an opportunity to amend their complaint.
>
> . . . .

SHARPNACK, C. J., and MATTINGLY-MAY, J., concurred.

LIGHT v. NIPSCO INDUS., INC., No. 44A05-0009-CV-402, ___ N.E.2d ___ (Ind. Ct. App. May 9, 2001).

GARRARD, Senior Judge

From the evidence that the gas was turned on and the representation that NIPSCO would have to be called to accomplish this it is inferable that NIPSCO in fact turned on the gas to the appliances in the dwelling. This evidence, however, does not support the further inference that NIPSCO actually inspected or attempted to inspect the installation of the appliances. Accordingly, the issue presented in this appeal is whether the mere assurance or promise that NIPSCO would inspect the connections and "make them do it right" is sufficient in the absence of any evidence that NIPSCO in fact attempted any such inspection to impose a tort duty of reasonable care.

. . . .

[RESTATEMENT (SECOND) OF TORTS] § 324A [(1977)] provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

While the Restatement provides the caveat that it expresses no opinion whether a gratuitous promise, without in any way entering upon performance, is sufficient to impose liability, Indiana decisions state that a promise is sufficient when coupled with reliance by the injured promissee. . . .

. . . .

We conclude, therefore, that while a gratuitous promise without more will not impose a duty upon which tort liability may be predicated, when that promise is accompanied by reliance on the part of the promisee, and the reliance was reasonable under the circumstances, a legal duty may be found.

. . . .

It follows that the evidence designated to the trial court was not sufficient to determine as a matter of law that NIPSCO had not voluntarily assumed a duty to the Lights based upon its representations, or promises, and Lights' reliance thereon. . . . [S]ummary judgment was inappropriate.

. . . .

BAKER, J., concurred.

MATHIAS, J., filed a separate written opinion in which he dissented, as follows:

[O]ur legal system has wisely placed limitations on the formal enforceability of *gratuitous* promises. Because I think those limitations should apply here, I must respectfully dissent.

. . . .

Under the facts and circumstances before us, I believe that the payments NIPSCO would eventually receive from the Lights for the natural gas to fuel the appliances installed by the third-party contractor could serve as adequate consideration to enforce NIPSCO's promise to inspect under traditional contract theory.

Instead, the majority has embarked down a tort path that will likely have far-reaching and undesirable consequences. For this reason, I must respectfully dissent.

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